

**CRIMINAL POSSESSION OF A WEAPON
IN THE THIRD DEGREE
(Prior Conviction)
Penal Law § 265.02 (5)(ii)
(Committed on or after July 2, 1981)
(Revised July 2016)¹**

The (specify) count is Criminal Possession of a Weapon in the Third Degree.

Under our law, a person is guilty of Criminal Possession of a Weapon in the Third Degree when that person knowingly² possesses a firearm and such possession did not take place in the person's home or place of business.³

The following terms used in that definition have a special meaning:

A FIREARM means any pistol or revolver.⁴

¹ In July 2016 and December 2022, the definition of "knowingly" was revised to better state the applicable law.

² The word "knowingly" has been added to this definition to comport with statutory law (see Penal Law §§ 15.00(2) and 15.05 [2]) and with case law. *People v Persce*, 204 NY 397, 402 (1912) ("the possession [of a slungshot] which is meant is a knowing and voluntary one"); *People v Saunders*, 85 NY2d 339, 341-42 (1995) ("Possession,' as part of the forbidden act, includes the Penal Law definitional component of '[v]oluntary act,' which incorporates the attribute of awareness of the possession or control Thus, the corpus delicti of weapons possession . . . is the voluntary, aware act of the possession of a weapon"); *People v Ford*, 66 NY2d 428, 440 (1985) (the offense of possession of a loaded firearm requires that the possession be knowing).

³ An additional element of the crime is that the defendant "has been previously convicted of (specify applicable crime) within the five years immediately preceding the commission of the offense." That element must be charged in a special information and after commencement of trial, the defendant must be arraigned on that information. If the defendant admits the element, the court must not make any reference to it in the offense's definition or in the elements of the offense. If the defendant denies the element or remains mute, the court must add the element to the offense's definition and the list of elements. (see CPL 200.60; *People v Cooper*, 78 NY2d 476, 481-482 [1991]).

⁴ The statutory definition of a "firearm" includes other weapons. If, therefore, a firearm, other than a pistol or revolver, is in issue, see "DEFINITION OF FIREARM

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁵

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of an object that is a firearm.⁶ That person need not know (that is, be aware of) the object's name or that it meets the definition of firearm.⁷

Under this count, the firearm need not be loaded but it must be operable. To be operable, a firearm must be capable of discharging ammunition. A person in possession of a firearm is not required to know that the firearm was operable.⁸

AS OTHER THAN A PISTOL OR REVOLVER" in "Additional Charges" at the end of the Table of Contents for Penal Law article 265 crimes.

⁵ Penal Law § 10.00 (8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, insert the appropriate instruction from the "Additional Charges" section at the end of the charges for this article.

⁶ See Penal Law § 15.05(2). For an expanded instruction on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

⁷ See *People v Parrilla*, 27 N.Y.3d 400, 405 (2016) (when possession of a gravity knife was a crime, defendants were required to know that "they possessed a knife" but the People were not required "to prove that defendants knew that the knife in their possession met the statutory definition of a gravity knife"); *People v Hernandez*, 180 AD3d 1234, 1237 (3d Dept 2020) ("Contrary to defendant's contention, the court was not required to instruct the jury that the People were required to show that defendant was aware of the legal definition of a blackjack. The characteristics of the blackjack at issue—a lead core, surrounded by leather, which is flexible and used as a weapon—make 'the inherently dangerous nature of the prohibited object be readily apparent, so as to put [defendant] on clear notice that the object is potentially subject to government regulation or prohibition' Accordingly, the People did not have to prove that defendant was aware of the statutory definition of a blackjack"); *People v Steinmetz*, 177 AD3d 1292, 1293 (4th Dept 2019) ("The People were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles"); *People v Abdullah*, 206 AD3d 1340, 1344 (3d Dept 2022) (knowing possession of a slungshot is required but a defendant need not know the dictionary definition of slungshot).

⁸ Case law has added "operability" of a firearm as an element of the crime

[Add if in issue:]

“HOME” has its ordinary meaning as a structure within which a person lives. “Home” also includes those areas around the home in which a person would reasonably be entitled to the privacy normally associated with a person’s home.

“Home” does not include any area around the home that is subject to unlimited public access, no matter how closely related a person may feel to that particular area as part of what that person calls “home,” or the extent to which a person uses the area as one would a part of his or her home.^{9]}

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, each of the following four elements:

1. That on or about (date), in the county of (County), the defendant, (defendant's name) possessed a firearm;
2. That the defendant did so knowingly;
3. That such firearm was operable; and

(see *People v Longshore*, 86 NY2d 851, 852 [1995]), but has further held that there is no requirement that the possessor know the firearm was operable (see *People v Parrilla*, 27 N.Y.3d 400 [2016] [“Defendants need only knowingly possess a firearm, they need not know that the firearm was loaded or operable”]; *People v Saunders*, 85 NY2d 339, 341-342 [1995]; *People v Ansare*, 96 AD2d 96, 97 [4th Dept 1983]). In December 2022, the last sentence was substituted for: “The defendant is not required to know that it is operable.”

⁸ See *People v Powell*, 54 NY2d 524, 530 (1981) (“[T]he common though unarticulated thread of all of the decisions above referred to is, as the Appellate Division suggests, whether the possessor of the weapon was entitled to ‘privacy, as one would have in his home’ in the area where he was apprehended with the weapon. The very antithesis of privacy is unlimited public access, no matter how closely related the possessor, as a subjective matter, may feel to the particular area as part of what he calls ‘home,’ or the extent to which he uses the area as one would a part of his home.”).

4. That such possession did not take place in the defendant's home or place of business.¹⁰

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

⁹ If the defendant has admitted the prior conviction, the crime will consist of *only* the four elements listed above. If the defendant has denied the previous conviction or has remained mute, add as the fifth element:

"and 5. That the defendant had been convicted of (specify applicable crime) within the five years immediately preceding such possession."